Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, AND INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do domestic insurance companies whose conduct otherwise would be exempt from federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance?

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INTEREST OF THE *AMICI*[1]

Amici curiae National Association of Casualty & Surety Agents, National Association of Professional Insurance Agents and Independent Insurance Agents of America, Inc., are non-profit trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. *Amici*'s members are independent agents who work at all levels of the insurance market with numerous insurance carriers, rather than in exclusive arrangements with one carrier. *Amici* submit their brief to supplement the arguments made by Petitioners on the one issue presented that is of particular concern to *amici* and their clients: whether McCarran-Ferguson immunity is forfeited solely by the participation in the regulatory process of an entity unregulated by the state.

Insurance agents serve as the only integrated point of contact in the insurance marketplace. In order to satisfy their customers' needs, agents interpret, compare, and administer insurance policies, and they strive to improve insurance availability and coverage. Agents also work daily with insurance company forms and policies. Insurance agents thus have an important interest in promoting policy reform that responds to the needs of both their companies and their customers—and in maintaining a regulatory system that facilitates such reform.

Insurance agents and their trade associations provide extensive information and expertise to advisory organizations which, in turn, compile data from a variety of sources for the ultimate benefit of state regulators, who rely on advisory organizations to learn about insurance policies and practices. Insurance agent representatives regularly meet with advisory organizations to suggest

[1] Petitioners and respondents have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

how insurance coverage can be enhanced, to comment upon the impact of proposed forms, and to provide counsel on issues of technical importance. Often *amici*'s advisory activity is performed in public fora, for example, in hearings before regulators and through mailings and press releases. This case is important to these *amici* because the Court of Appeals' decision threatens both the ability of advisory organizations, like petitioner Insurance Services Office, Inc. ("ISO"), to freely gather information for ultimate use by state regulators, and also the participation of insurance agents and their trade associations in the state-regulated business of insurance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Advisory organizations have historically been enlisted in state efforts to regulate the insurance industry. Such organizations are numerous and the roles they play in the industry are diverse. For example, petitioner ISO provides policy forms used in a wide range of property and casualty insurance coverages, and the National Council on Compensation Insurance ("NCCI") specializes in workers compensation issues. Often pursuant to express statutory mandates, ISO and NCCI play an important role in developing, and recommending to state regulators, proposed policy forms—the standardized components that, when taken together, compose an insurance contract.[2] Other advisory organizations include the

[2] Standardization of policy forms is a vital and valid state regulatory goal. It permits insurance agents and their customers more easily to compare competing insurance policies and, therefore, to exercise more informed choice over their purchasing decisions. It establishes minimum components that can be modified or supplemented by competing insurance companies. Standardization is particularly important in that it is increasingly necessary for commercial insureds, in particular, to seek policies from several carriers. It is thus imperative that there be a clear industry-wide understanding of what is necessary for various policy forms and that there be a high degree of commonality in language and applicability so that the entire package of coverage fits together to the satisfaction of the insured.

National Industry Committee on Automobile Insurance Plans and the National Committee on Casualty and Property Insurance. These organizations collect information and develop plans of operation for the automobile and property residual markets in each state; state commissioners rely upon their work to facilitate the process of fashioning policy that is uniform, where desirable, and crafted to suit their state's particular needs where appropriate. The International Association of Industry Accident Boards and Commissioners, another example, works at the national level to develop workers compensation policies and procedures for use by state legislatures and regulators in developing coordinated workers compensation policies. And the American Association of Insurance Services serves the same function as ISO for smaller companies principally serving rural communities.

In carrying out their valuable work, advisory organizations have long sought comments on proposed policy forms from a wide body of interested parties in the insurance industry. The purpose of such consultation is straightforward: a fully informed process aids the advisory organizations and, in turn, the state regulators who seek their advice. The ultimate beneficiary, of course, is the consumer, who gains from knowledgeable and successful insurance regulation. Open dialogue is vital to the success of the advisory process—without regard to whether suggestions come from a licensed or unlicensed entity within or beyond state insurance jurisdiction. A good idea is, after all, a good idea regardless of its source.

The marketplace of ideas assumes that the best ideas will be translated into action. But discussion and acceptance of new proposals can easily lead to charges of "conspiracy"—an elastic term of uncertain meaning whose mere appearance on a court pleading can lead to years of burdensome litigation and can deter legitimate behavior. Preventing that result, the antitrust exemption

contained in the McCarran-Ferguson Act permits advisory organizations to fulfill their designated function by engaging in consultation with all groups whose views would be of interest to the state regulators themselves—insurers, reinsurers, insurance agents, brokers, buyers, claimants, and other regulators.

The decision below would eliminate the antitrust immunity provided by the McCarran-Ferguson Act whenever unregulated entities participate in otherwise immunized conduct. But there are at least three reasons why McCarran-Ferguson protection applies without regard to whether a specific entity in the insurance business is within or without the regulatory reach of a particular state insurance regulator. *First*, this limitation on immunity would impair the ability of states to regulate the business of insurance on an informed basis by obtaining information from unregulated entities through advisory organizations. *Second*, states have full authority to regulate the impact of foreign insurers, and other nonregulated insurance entities, on the insurance buying public. *Third*, the decision below would violate the settled principle recognized by this Court that applicability of antitrust immunities depends on the nature of the challenged activity, not on the identity of the participants.

ARGUMENT

In relevant part, the McCarran-Ferguson Act provides an antitrust exemption for "the business of insurance," to the extent that insurance activities are "regulated by State law." 15 U.S.C. 1012(b). The Ninth Circuit ruled that the "state regulation" component could not be met in this case because immunity was forfeited as a result of ISO consultation with foreign reinsurers "beyond the jurisdiction of the states." Pet. App. at 19a.[3] By so ruling, the Ninth Circuit effectively turned a geographic limit on state regulatory jurisdiction into a substantive limit on the scope of the McCarran-Ferguson exemption. The Ninth Circuit decision imperils the ability of advisory organizations to collect the views of interested parties and to pass them along to state regulators, and it more generally impairs the authority of states to regulate insurance-related activities that legitimately involve unregulated entities.

First, denial of McCarran-Ferguson immunity undermines the basic purpose of the Act—to facilitate informed decisions by insurance companies and by regulators. The McCarran-Ferguson Act ensures that cooperative activities within the insurance industry are conducted "in an *informed* and responsible way." *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979) (emphasis added). Congress equally sought to protect the ability of state regulators to gather the information they need to regulate responsibly. The overall legislative goal was to protect "the type of state regulation that centers around the contract of insurance . . . [including the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Permitting advisory organizations freedom to consult with knowledgeable parties advances the goal of informed state regulation centered around the insurance contract. A number of states expressly authorize advisory organizations like ISO or NCCI to "[p]repare and file policy forms and endorsements and consult with members, subscribers and others relative to their use and application." Ark. Stat. Ann. § 23-67-116; Haw. Rev. Stat. § 431:14-107-1; Me. Rev. Stat. Ann., tit. 24-A § 2321-D; Miss. Code Ann. § 83-2-15; *see also* Ken. Rev. Stat. Ann § 304.13-121 (permitting advisory organizations to consult with "members and others" on use of policy forms); Wyo. Stat. § 26-14-109 (also permitting advisory organization to consult with "members, subscribers and others" on policy forms).[4] The meaning of the statutory reference to "others" is plain: advisory organizations are permitted to consult with any interested party, like the *amici* here, in order to provide the state insurance regulators with the best

[3] Alternatively, the Ninth Circuit held that the actions of the petitioners constituted a "boycott." Action that constitutes a boycott does not, of course, enjoy the protection of McCarran-Ferguson antitrust exemption, *see* 15 U.S.C. § 1012(b), and this Court has separately granted certiorari to consider the boycott issue. Certain counts of the complaint do not allege any boycott, and in any event, regardless of the resolution of the boycott question in other counts, these *amici* believe that the Court should resolve the issue addressed in this *amicus* brief. If merely vacated, the Ninth Circuit ruling and the public position taken by state law enforcement agencies in this litigation would continue to chill open communication between state regulators, advisory groups and entities in the insurance business. Once provided with the benefit of full briefing and oral argument, this Court should rule definitely whether the Ninth Circuit correctly held that the presence of foreign insurers had, by itself, caused the forfeiture of McCarran-Ferguson immunity.

[4] The State of Colorado has given advisory organizations even broader responsibilities, establishing a statutory right for any aggrieved party to file a complaint with an advisory organization to obtain review of "the manner in which the [policy form] has been applied with respect to insurance afforded him." Colo. Rev. Stat. § 10-4-418.

possible advice. The states are free to accept, reject or modify that advice.[5]

Statutory authorization of consultation with an unlimited range of people simply tracks common sense. The task entrusted to advisory organizations—to advise regulators on matters of insurance policy—cannot be performed without consultation with all those involved in the purchase and supply of insurance contracts, including reinsurers (who are asked to supply layers of coverage) and insurance agents (who are asked to explain, sell and service that coverage).

This consultative process goes to the heart of the McCarran-Ferguson exemption because it bears the imprimatur of state regulators and deals directly with the meaning and content of the insurance contract. The issue is not, as the Ninth Circuit concluded, whether states can directly regulate foreign insurers. State regulators have, through an advisory organization, invited reinsurers to provide their views about the terms and conditions of insurance contracts. States have ample authority to oversee this process to ensure that it does not become a vehicle for illegal agreements victimizing the consumers protected by state insurance laws. Because each state has jurisdiction over the challenged practice—the manner in which an advisory organization formulates advisory policy forms—the "state regulation" requirement is fully satisfied.

[5] The uncontested allegations of this case illustrate that consultative process between ISO and state insurance regulators. After ISO proposed standardized Commercial General Liability forms, various insurance departments held continuing discussions with ISO concerning the content of the proposed forms, ISO prepared revisions of the proposed forms, and, finally, states decided whether to approve the forms. Petition for a Writ of Certiorari, Hartford Fire Insurance Co., et al., at 4-6.

Artificial limits on antitrust protection for this process would only constrict the flow of information to insurance regulators and impair their ability to function effectively. If consultation with those not directly regulated by states would strip McCarran-Ferguson protection from *all* participants in that process, advisory organizations can be expected to become wary of consulting with anyone except regulated domestic insurance companies. Foreign reinsurers, for example, represent a repository of experience that is invaluable to advisory organizations evaluating issues to be considered by a host of states. A crabbed interpretation of McCarran-Ferguson protection would inevitably discourage the dialogue essential to make this process work and would subvert the consumer interest in a fully informed advisory system.

Second, denial of McCarran-Ferguson in this instance rests on a fundamental misunderstanding of the nature of insurance regulation. Because insurance policies are ultimately provided to the public by an entity (agent, broker or insurer) whose activities are entirely within the ambit of state regulation, the state retains the complete ability to regulate the impact of insurance practices on the public. Thus the Ninth Circuit was fundamentally confused when it equated jurisdiction over a foreign insurer with the ability to control the impact of foreign insurers on the state's citizens.

The decision below turned on the false assumption that agreements that include domestic insurance companies cannot be regulated if one party to that agreement is a foreign reinsurance company beyond the direct reach of state regulation. Through statutes generally proscribing unfair insurance practices and otherwise, state regulators have complete authority to regulate the impact of insurance practices on their citizens, even if one aspect of that impact can be derivatively traced to a foreign insurer.

For example, even before passage of the McCarran-Ferguson Act, states regulated the relationship between domestic insurance companies and foreign reinsurance companies, requiring, for example, domestic insurance companies to obtain approval of reinsurance agreements with such companies. *Taggart v. Keim*, 103 F.2d 194, 196 (3d Cir. 1939); *Ballou v. Davis*, 75 F.2d 138, 140 (7th Cir.), *cert. denied*, 295 U.S. 766 (1935). State regulation of that relationship continues today because agreements with reinsurance companies, whether domestic or foreign, directly affect the reliability and solvency of regulated domestic insurance companies. *E.g., Coppage v. Resolute Ins. Co.*, 264 Md. 261, 285 A.2d 626 (1972) (interpreting statute requiring regulatory approval of certain reinsurance contracts); *see generally* 19 *Couch on Insurance 2d* § 80:20, at 636-37 (1983); 13A J. Appleman & J. Appleman, *Insurance Law and Practice* § 7682, at 489-90 (1976). Indeed, states have broad authority over dealings between domestic insurers and *all* types of entities not directly subject to state insurance regulation. *Ford Motor Co. v. Insurance Comm'r of Pennsylvania*, 874 F.2d 926, 940-45 (3d Cir.) (upholding state prohibition of affiliations between domestic insurance companies and out-of-state financial institutions), *cert. denied*, 493 U.S. 969 (1989). As an example, the National Association of Insurance Commissioners has adopted a model Insurance Holding Company System Regulatory Act that more than 50 states and territories have adopted in whole or in part, and Section 5(A)(2)(c) of the model Act provides for state regulatory review of reinsurance agreements entered into by domestic insurers.

State regulation of surplus lines insurance follows the same pattern. A surplus line insurance company is one which is not authorized to do business within the state but is licensed in its own state for the purpose of providing excess insurance. In most states, surplus line insurance may be legally placed only when the full amount

of coverage is not (with diligent effort) available from a domestic insurer. In this manner, surplus lines insurers bring additional capacity to the insurance marketplace. Many such insurers are foreign entities. States traditionally control the impact of their activities by regulating the activities of the surplus lines broker, a domestic entity whose placement of coverage with a foreign insurer is fully within the regulatory jurisdiction of the relevant state.[6]

This means of indirect control is apparent in the uncontested allegations of this case. It is admitted that, even after the alleged agreement between domestic and foreign insurers to offer coverage of only a certain kind through a particular insurance form, state insurance regulators decided whether to approve the use of the form. *See supra* note 5. By such decisions, state insurance regulators can control the impact of the actions of foreign reinsurers by regulating the entity, here an advisory organization, that is well within their jurisdiction.[7]

In sum, the McCarran-Ferguson Act's "purpose was broadly to give support to the existing and future state systems for regulating . . . the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946); *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299-301 (1960).[8] Against this background, it would be

[6] For example, states commonly prohibit brokers from placing insurance with a financially unsound surplus line insurer or an insurer with capital stock and surplus amounts below a set minimum level. *E.g., Sternoff Metals Corp. v. Vertecs*, 39 Wash. App. 333, 693 P.2d 175, 180 (1984). Some states also have a list of approved insurers that are permitted to supply excess and surplus coverage.

[7] Of course, if a foreign reinsurer's actions were found to constitute a boycott, McCarran-Ferguson protection would be lost. *See* 15 U.S.C. § 1012(b).

[8] Although Congress recognized that states lack the power to directly regulate contracts of reinsurance entered into outside

absurd to contend that McCarran-Ferguson called into question the states' longstanding authority to regulate the arrangements made by domestic insurers or advisory organizations with foreign insurers—just as the Act did not diminish the power of states to invite non-regulated entities to participate in collective activities with regulated entities. So long as the relationship with unregulated entities is part of the business of insurance, the participation of unregulated entities does not offend the purposes of McCarran-Ferguson.

Third, contrary to this Court's precedent, the decision below improperly focusses on the identity of the parties to the challenged conduct rather than on the nature of that conduct. Indeed, the Court has recognized in other contexts that providing immunity for one party to a protected activity but not another thwarts the purpose of the immunity. Hence the antitrust laws concentrate on "the nature of the activity challenged, rather than on the identity of the defendant." *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 58-59 (1985).

In that case, the Court held that Congress did not intend the Sherman Act to compromise the right of states to regulate collective common carrier ratemaking and, therefore, both state regulators and also common carriers engaged in collective ratemaking must be protected when they engage in regulated activities. *Id.* at 56-57. By the same token, because Congress intended the McCarran-Ferguson Act to protect the right of states to regulate the business of insurance, both the subjects of regula-

their own jurisdiction, H.R. Rep. 143, 79th Cong. 1st Sess. 3 (1945), *quoted in FTC v. Travelers Health Ass'n*, 362 U.S. at 300-01, nothing in the legislative history of the McCarran-Ferguson Act indicates that Congress understood that states lacked the authority to regulate contracts with foreign reinsurers when there was a reasonable connection with state regulatory authority over domestic insurance companies.

tion and other insurance participants in the regulatory process must be protected. As explained above, the terms on which regulated entities deal with non-regulated entities are fully subject to state regulation. *See supra* pages 9-12.

Consistent with this principle, the Act's language "refers not to persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 459 (emphasis in original). It would frustrate the purpose of the McCarran-Ferguson Act to strip immunity from domestic insurance companies otherwise entitled to this protection merely because they dealt with foreign insurance companies or other non-regulated entities in the business of insurance.

The Court has repeatedly recognized that an agreement between an exempt and non-exempt entity is *not* automatically outside an antitrust exemption. When it held that an insurance company's agreement with a pharmacy was not part of the business of insurance, the Court commented by way of analogy that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. at 231.

The origin of this analogy demonstrates, however, its inapplicability here. The labor union cases cited in support of the *Royal Drug* statement, 440 U.S. at 231-32, hold only that agreements with non-exempt entities lose the traditional labor-union immunity *if* they are not the kind of agreements that the exemption was intended to protect. Thus, it is "beyond question that a union may conclude a wage agreement with a multi-employer bargaining unit without violating the antitrust laws," and the immunity is not available only for *certain types of agreements* with non-exempt employers. *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

Similarly, the citation in *Royal Drug* to the exemption for agricultural cooperatives, 440 U.S. at 231-32, invokes precedent holding that an agreement between an exempt agricultural cooperative and non-exempt parties is lawful under the Capper-Volstead Act as long as it facilitates protected marketing activities without unreasonably restraining trade. *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466-67, 471-72 (1960). The exemption is lost only if an agricultural cooperative enters an agreement with an entity that does not produce agricultural products, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1976).

These cases support the *Royal Drug* holding that an agreement between an insurer and non-insurance entity is beyond the scope of McCarran-Ferguson. But here, unlike *Royal Drug*, it is undisputed that all of the entities were found to be in the business of insurance [9] and, therefore, antitrust immunity should apply.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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[9] *In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991).